STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of JONATHAN WAYNE BOERMA, Deceased.

MARTHA J. BOERMA, Personal Representative of the Estate of JONATHAN WAYNE BOERMA, Deceased,

Plaintiff-Appellant,

v

WILLIAM DOUGLAS BURKS, JR.,

Defendant,

and

DOROTHY ELLEN LUELLEN,

Defendant-Appellee.

UNPUBLISHED
January 14, 2003

No. 233257
Mecosta Circuit Court
LC No. 98-012925-NI

Before: Meter, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting a directed verdict in favor of defendant, Dorothy Ellen Luellen. We affirm.

Plaintiff, the personal representative of the estate of the decedent, Jonathan Wayne Boerma, filed a complaint against defendant Luellen alleging that she was liable under the owner's liability statute, MCL 257.401(1), because she was the owner of a vehicle that was negligently driven and that resulted in the death of plaintiff's decedent. The driver of the vehicle was defendant's grandson, William Douglas Burks, Jr. Plaintiff also filed a complaint against Patricia Ellenburg, Luellen's daughter and Burks' mother, alleging that she, too, was liable under the owner's liability statute. The cases were consolidated for trial. At the close of plaintiff's proofs, defendant Luellen moved for a directed verdict, and the trial court granted the motion. The case proceeded to trial resulting in verdicts for the plaintiff against Burks as operator of the

motor vehicle and Ellenburg as a statutory owner. MCL 257.401(1); MCL 257.37(a). No appeal or cross appeal has been taken from the verdicts.

Plaintiff first argues that the trial court erred in granting the motion for a directed verdict. "This Court reviews de novo the trial court's decision on a motion for a directed verdict." *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 634; 601 NW2d 160 (1999). When evaluating a motion for a directed verdict, this Court must consider all the evidence admitted until the time of the motion in the light most favorable to the nonmoving party. *Tobin v Providence Hosp*, 244 Mich App 626, 651-652; 624 NW2d 548 (2001). Only if the evidence failed to establish a claim as a matter of law is a directed verdict properly granted. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).

According to plaintiff, Luellen was liable under the owner's liability statute because she was an owner of the vehicle at the time of the accident and she failed to rebut the presumption that Burks was driving the vehicle with her express or implied consent or knowledge. MCL 257.401(1) provides, in relevant part:

> The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family.

The purpose of the owner's liability statute is to place the risk of damage or injury upon the person who has the ultimate control of the vehicle, the owner. *Ringewold v Bos*, 200 Mich App 131, 134; 503 NW2d 716 (1993). To subject an owner to liability under the owner's liability statute, "an injured person need only prove that the defendant is the owner of the vehicle and that it was being operated with the defendant's knowledge or consent." *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998).

There is a statutory presumption that the vehicle owner consented to a driver's use of the vehicle if the driver is the owner's "spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family." MCL 257.401(1). In addition, there is a common-law presumption of consent that arises even if the operator of a motor vehicle is not a member of the owner's family. *Bieszck v Avis Rent-A-Car Systems, Inc*, 459 Mich 9, 18-19; 583 NW2d 691 (1998). Both the common-law and statutory presumptions of consent are rebuttable upon a showing of positive, unequivocal, strong, and credible evidence that the owner did not consent. *Krisher v Duff*, 331 Mich 699, 706; 50 NW2d 332 (1951); *Lahey v Sharp*, 23 Mich App 556, 559; 179 NW2d 195 (1970).

The definition of "owner" in the Motor Vehicle Code includes "a person who holds the legal title of a vehicle." MCL 257.37(b). This Court has consistently held that the definition of "owner" as used in the Motor Vehicle Code must be broadly construed to include persons who are named on the legal title of the vehicle. *Basgall v Kovach*, 156 Mich App 323, 327; 401

NW2d 638 (1986). Luellen's name was on the certificate of title to the vehicle at the time of the accident. Therefore, she was an "owner" of the vehicle under MCL 257.37(b).

The statutory presumption that Luellen consented to Burks driving the vehicle on the night of the accident does not apply because Burks was not her spouse, father, mother, brother, sister, son or daughter and because Burks was not an "immediate member of the family" within the meaning of MCL 257.401(1), even though he was her grandson, because he did not reside in her house and was not a member of her household. *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 338; 608 NW2d 66 (2000). However, even though the statutory presumption of consent does not apply in this case, the common law presumption of consent is still applicable. *Bieszck, supra*, 459 Mich at 18-19.

Patricia Ellenburg testified at trial that she took possession of the vehicle immediately when it was purchased and that she paid for the license plates, registration, insurance, and made the loan payments. Defendant Luellen was an accommodating owner for financing of the vehicle as Ellenburg could not get a loan. The vehicle loan was paid on September 12, 1994, and Luellen signed the title and mailed it to Ellenburg to transfer legal ownership. [The date of accident was May 29,1996.] Ellenburg admitted that she failed to take the necessary steps to transfer legal title to herself. She further testified that defendant neither drove the vehicle nor had ever exercised any control or dominion over the vehicle. Defendant had no knowledge that Burks had ever used the vehicle. Burks owned his own motor vehicle. Finally she testified that neither she nor Luellen knew that Burks was driving the vehicle on the night of the accident or gave Burks permission to drive the vehicle.

The testimony of Patricia Ellenburg was the only evidence presented on the issue of knowledge and consent. The uncontradicted evidence of a defendant alone can constitute clear, positive, and credible evidence to rebut the presumption of consent and justify a directed verdict for the defendant. *Krisher, supra,* 331 Mich at 710. Therefore, because the evidence at trial was that Luellen did not expressly or impliedly consent to or have knowledge that Burks was driving the vehicle on the night of the accident, the trial court properly granted the motion for a directed verdict.

Plaintiff next argues that the trial court abused its discretion in refusing to admit as substantive evidence against defendant Luellen paragraph 19 of Patricia Ellenburg's answer to plaintiff's complaint or permit plaintiff to recall Ellenburg to the witness stand to cross-examine her concerning her answer. At trial, Ellenburg testified that she did not consent or give permission to Burks to drive the vehicle on the night of the accident. However, in her paragraph 19 answer she admitted, "Patricia Ann Ellenburg is liable for all damages sustained by the Plaintiff arising out of her ownership of the 1988 grey Toyota pick-up pursuant to MCL 257.401; MSA 9.2101 as William Douglas Burks, Jr. was using the vehicle which was owned by her with her permission at the time of the accident." She was not confronted with her paragraph 19 answer, a contradictory admission on this point, during her testimony. Defendant Luellen had not so admitted. At the close of Plaintiff's proofs, but before resting, defendant sought to interject her motion for directed verdict. Plaintiff requested the court to take judicial notice of the Ellenburg paragraph 19 admission *as substantive evidence* in opposition to the directed verdict motion of defendant or allow the recalling and cross-examination of Ellenburg.

It is a well-established rule that admissions of one defendant are not admissible as substantive evidence against a codefendant. *Lenzo v Maren Engineering Corp*, 132 Mich App 362, 366; 347 NW2d 32 (1984); *Smith v Woronoff*, 75 Mich App 24, 30; 254 NW2d 637 (1977). Consequently, the trial court did not abuse its discretion in refusing to admit paragraph 19 of Ellenburg's answer to plaintiff's complaint as substantive evidence against defendant.

In addition, the trial court did not abuse its discretion in refusing to permit plaintiff to recall Ellenburg to the witness stand for the purpose of cross-examining her and impeaching her testimony with her prior inconsistent statement in her answer. Plaintiff did, in fact, cross-examine Ellenburg at trial. However, during cross-examination, plaintiff's counsel did not seek to cross-examine Ellenburg regarding her response in paragraph 19 of her answer.

Prior inconsistent statements may be used in some circumstances to impeach credibility. MRE 613; *People v Stanaway*, 446 Mich 643, 692; 521 NW2d 557 (1994). However, when the substance of a prior inconsistent statement goes to a central issue of the case against another defendant, it is improper to admit the hearsay statement because it serves the improper purpose of attempting to prove the truth of the matter asserted as it relates to that other party. MRE 801; *Stanaway, supra*, 446 Mich at 692-693. The substance of paragraph 19 of Ellenburg's answer was the admission of liability and permission to defendant Burks operating the vehicle on the night of the accident as it related to Ellenburg. In this case, the central issue at trial was whether the instant defendant consented to Burks driving the vehicle.[1] Consequently, the substance of Ellenburg's prior inconsistent statement went to the central issue of the case. Paragraph 19 of Ellenburg's answer, if admitted, would have served the improper purpose of proving the truth of the matter asserted: that Ellenburg consented to defendant Burks using the vehicle and therefore, permission was extended by defendant to Burks by extrapolation. Plaintiff admitted at trial that she had no other evidence on the issue of knowledge or consent by the instant defendant. The trial court did not abuse its discretion in refusing to permit plaintiff to recall and cross-examine Ellenburg regarding paragraph 19 of her answer as no substantive evidence against the instant defendant would be forthcoming.

Affirmed.

Patrick M. Meter
Janet T. Neff
Pat M. Donofrio

[1] Whether Ellenburg consented to Burks driving the vehicle is significant because our Supreme Court has found liability on the part of a defendant car owner when the party to whom the defendant consented to operate the vehicle subsequently gave consent to a third party and the third party caused an accident and injured someone. *Cowan v Strecker*, 394 Mich 110; 229 NW2d 302 (1975).